S.Q.I. Roofing, Inc. *and* Local 54 of the United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO. Case 19-CA-14855

28 June 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 3 June 1983 Administrative Law Judge Earldean V.S. Robbins issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the Order as modified and set forth in full below.

We agree with the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Boyd, Campbell, Fogafa, and Tacardon because they are union members and because they protested the Respondent's stated intention not to pay the contractually required wage rate for weekend work.[2] In addition, we affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union about the scheduling of weekend work, and by bypassing the Union and dealing directly with employees regarding weekend work.[3]

We find, however, that the judge erred in concluding that the Respondent unlawfully refused to pay the contractual weekend wage rate. It is undisputed that, despite the Respondent's plan to pay straight time for the weekend work at issue, the Respondent in fact paid the proper double time rate to the employees for their 4 hours of work on Saturday, 31 July 1982. Accordingly, there is no basis for finding that the Respondent did not adhere to the contractual wage rate for weekend work, and we will dismiss that allegation of the complaint.

ORDER[4]

The National Labor Relations Board orders that the Respondent, S.Q.I. Roofing, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dealing directly with its employees in derogation of the Union's status as exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All journeymen roofers, apprentices, and pre-apprentices employed by Employer-members of the Association in the counties of Clallam, Jefferson, King, Kitsap, Mason and Snohomish, Washington, excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to abide by the contractual provisions that the Union be notified with regard to the scheduling of work on Saturday and Sunday.

(c) Discharging or otherwise discriminating against employees because the Union demands that it pay them the weekend wage rates required by the collective-bargaining agreement or because of their other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pursuant to contractual obligation, notify the Union of the scheduling of work on Saturday and Sunday and, on request, bargain with the Union as the exclusive representative of the employees in the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to rely on the judge's alternative rationale in fn. 18 for finding a violation based on an assumption the employees walked off the job, rather than being ordered off by the Respondent.

[3] We agree with the judge's refusal to defer the failure to notify issue to the parties' grievance and arbitration machinery. The judge relied, in part, on *General American Transportation Corp.*, 228 NLRB 808 (1977), which the Board recently overruled in *United Technologies Corp.*, 268 NLRB 557 (1984). Nevertheless, we find that the interests of orderly procedure and fairness to all parties were best served by declining to defer the notification issue. We note that that issue is related to the other complaint allegations which the Respondent has not asked be deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971). In view of the close interrelationship of the failure to notify allegation to the other complaint allegations, which we necessarily must determine, there is no compelling reason for deferring one aspect of the dispute to the grievance-arbitration machinery. *George Koch Sons, Inc.*, 199 NLRB 166 (1972). Member Zimmerman would not defer, in any event, for the reasons stated by the judge.

[4] The four unlawfully discharged employees were offered unconditional reinstatement about 16 August 1982. Accordingly, we eliminate the reinstatement remedy from the Order. Further, we correct the judge's omission of the unit description from the Order, and we modify the affirmative section of the Order to require compliance with, and bargaining about, the specific contractual provisions concerning weekend work. We therefore substitute a new Order and notice for that recommended by the judge.

unit described above regarding the scheduling of weekend work.

(b) Make Philo Boyd, William Campbell, Joseph Fogafa, and Clifford Tacardon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Seattle, Washington, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT deal directly with our employees in derogation of the status of Local 54 of the United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the bargaining unit:

All journeymen roofers, apprentices, and preapprentices employed by Employer-members of the Association in the counties of Clallam, Jefferson, King, Kitsap, Mason and Snohomish, Washington, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to abide by the contractual provisions that the Union be notified with regard to the scheduling of work on Saturday and Sunday.

WE WILL NOT discharge or otherwise discriminate against any of you because the Union demands that we pay you the weekend wage rates required by the collective-bargaining agreement or because of your other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, pursuant to contractual obligation, notify the Union of the scheduling of work on Saturday and Sunday and, on request, bargain with the Union as the exclusive representative of the employees in the unit described above regarding the scheduling of weekend work.

WE WILL make Philo Boyd, William Campbell, Joseph Fogafa, and Clifford Tacardon whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

S.Q.I. ROOFING, INC.

DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge. This matter was heard before me in Seattle, Washington, on February 15, 1983. The charge was filed by Local 54 of the United Slate, Tile and Composition Roofers,

Damp and Waterproof Workers Association, AFL-CIO (the Union) and was served on S.Q.I. Roofing, Inc. (Respondent) on August 2, 1982. The second amended complaint, which issued on January 24, 1983, alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The basic issues herein are:

1. Whether Respondent unlawfully refused to bargain by bypassing the Union and directly soliciting employees to agree to a change in their work schedule and by failing to follow the contractual procedure for changing the work schedule and refusing to adhere to the contractual wage rates.

2. Whether Respondent ordered certain employees off the job and subsequently laid them off because they protested said unlawful refusal to bargain.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent has been, and is now, an employer-member of the Roofing Contractors Association (the Association) an organization composed of employers engaged in roofing construction, which exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union. During the 12-month period preceding the issuance of the complaint herein, which period is representative of all times material herein, the Association, in the course and conduct of its business operations, had gross sales of goods and services valued in excess of $500,000, and purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside said State or from suppliers within said State which in turn obtained such goods and materials directly from sources outside said State.

The complaint alleges, Respondent admits, and I find that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent's employees are covered by a collective-bargaining agreement between the Association and the Union effective, by its terms, from June 1, 1981, to May 31, 1985, which provides, inter alia:

ARTICLE IV

WORKDAY

Section A Eight (8) hours labor shall constitute a day's work between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except where there is a mutual agreement between the Local Union and the shop to work other hours.

Section B All work performed before 8:00 a.m. or after 4:30 p.m. shall be considered overtime. The first two (2) hours of overtime shall be compensated for at the time-and-a-half rate of pay. Additional overtime shall be compensated for at the double-time rate of pay. All work performed on Saturday, Sunday or Holidays shall be compensated for at the double-time rate of pay.

Section C The Employer agrees to notify the Union by telephone no later than 4:00 p.m. Friday or the day before a Holiday of any work intended to be done Saturday, Sunday or on a Holiday. In case of an emergency to preserve life or property occurring after 2:00 p.m., the Union shall be notified immediately.

It is undisputed that Respondent had a contract to reroof a psychiatric clinic which required the work to be done solely on weekends. It is also undisputed that the five employees in Respondent's employ at the time were notified of this weekend work requirement. It is further undisputed that Respondent sought the agreement of the employees[1] to work on Saturday and Sunday and to take off either Thursday and Friday or Monday and Tuesday; and that Respondent did not notify the Union of its intent to work on the weekend of July 31. According to Kotson, this was simply an oversight on his part. According to Kotson, it was only after he submitted his bid for the clinic job that the customer stipulated that the job had to be done on Saturday and Sunday so as to avoid disturbing the patients. The client requested that the work be performed on weekends at the bid price. However, when computing the bid price, Kotson had not taken into consideration penalty pay so he told the client he would have to discuss it with the employees and see if it could be done, which he did immediately thereafter. There is some dispute as to whether Kotson specifically informed the employees they would be compensated for this weekend work at a straight-time rate. However, it is clear that in seeking their agreement, Kotson contemplated straight-time pay and that most of the employees understood this[2] since in the past they had worked for Respondent on weekends for straight-time pay to make up for days lost during the week.

The employees did agree to work on the weekend and reported for work, as agreed, on Saturday, July 31, 1982.[3] About 11 a.m. that day, upon observing Respond-

[1] Kotson or Gette spoke to some of the employees directly. Other employees learned of the situation from fellow employees.

[2] Campbell testified that he was unsure as to whether they would be paid at the straight-time rate or the double-time rate.

[3] Unless otherwise indicated, all dates herein are in 1982.

ent's equipment at the clinic, Union Business Representative Brian Doherty stopped and approached the jobsite. Herbert Gette, Respondent's superintendent, leaned over the edge of the roof and greeted Doherty. According to Doherty, he asked Gette if it was not an expensive day to be working. Gette said, "If you are referring to the overtime, you have to contact the owner." Doherty suggested that because Gette had been identified as one of the owners,[4] he expected that Gette could reply to the question. Gette then walked over to the person working on the kettle, John Hill, who was not a member of the Union[5] and had not been referred to perform roofing work for Respondent in accordance with the referral procedure of the collective-bargaining agreement. Doherty gave Hill a referral slip since he was performing unit work.[6] Gette and Hill testified in agreement with Doherty that he first approached Gette and then he approached Hill regarding a dispatch slip. Gette also agrees that when Doherty approached him, Doherty made a comment to the effect that it was expensive to work on Saturday. However, Gette testified that not only did he suggest that Doherty discuss the matter with Respondent's owner Jerry Kotson, he also told Doherty that this was neither the time nor the place to discuss anything, that the matter should be discussed with Kotson on Monday.

It is undisputed that following this conversation, Gette told the employees working on the roof that Doherty was at the jobsite. According to employee William Campbell, Gette asked him who called Doherty; to which Campbell replied, "I didn't call him or I wouldn't be here." According to employee Clifford C. Tacardon, upon noticing that Gette was stomping around and appeared angry, he asked, "What did we do wrong now?" Gette replied, "Your union representative is here," and then went over and kicked a unit in a corner of the roof. Gette does not deny Tacardon's testimony in this regard. However, he did testify that when he mentioned that Doherty was on the jobsite, one of the employees asked who called Doherty and another employee replied, "We're all here, none of us called him." At the time, Campbell, Tacardon, and employee Joe Fogafa were working on the roof along with Gette.

After speaking with Hill, Doherty went up on the roof. According to him, he immediately approached Gette and Gette said, "If you are here to stop us from working, you should be more concerned about the nonunion shops that are doing work and paying less and we can't afford to pay the penalty pay as provided in the contract and we're not going to pay the penalty pay as provided in the contract." Doherty said the contract had been signed by the Employer, therefore it was expected that the penalty pay should be paid to employees who worked on Saturday.[7] At this point, Gette told the employees that they were to finish sweeping up the material in the far corner of the roof where they were working, get their tools, and leave the job. After Gette made this statement, Doherty walked over to where the employees were working and told them, "He says you are not getting paid overtime." Doherty then left the roof. Doherty denies that he told the employees to leave the job.

Campbell corroborates Doherty's testimony that he first talked to Gette. Tacardon testified that Doherty and Gette did have a conversation but he does not recall whether Doherty spoke to Gette first, and did not hear their conversation. According to Campbell, he heard a portion of the conversation. Specifically, he heard Doherty ask Gette if he was paying double time for the weekend work. Gette said, no, he was not going to. He said he barely made enough money to pay straight time and further said, "If you think I'm going to pay double time, you can take these men off the roof or I'll send them home myself." Gette then came over to Campbell, told him to get the roof cleaned up and make sure the kettle was full and head back to the shop.

Tacardon testified that Doherty spoke to the employees individually.[8] According to him, when Doherty came over to him, Doherty said they were not getting overtime or penalty pay for working on a Saturday. At this point, Gette said Respondent did not make enough money or there were not enough jobs to be able to pay double time, that the jobs were too hard to get but, if they wanted to go with the Union, they could leave the job and he could finish it himself. By this, Tacardon understood Gette to mean that he was going to finish the job himself, he did not intend to pay double time, so the employees could just leave. Campbell testified that he does not recall Gette saying to the employees, "Take your clothes and your tools if you're leaving." He does recall Gette telling him to get the roof cleaned up, make sure the kettle was full, and head back to the shop. He is not sure if Doherty was still on the roof at that time. Tacardon testified that Gette asked Doherty if it was all right if they finished up what had been torn or cleaned it up so they could get it sealed. Doherty said, yes. So the employees remained and cleaned up the roof so that Gette and Hill could cover it.

Gette testified that about 5 minutes after he told the employees Doherty was on the jobsite, Doherty came up on the roof and immediately went over and talked to the three employees prior to having any conversation with Gette. Doherty then came over to Gette and said the men were working in violation of the working agreement, they were working for straight time, not double time, and Respondent had not reported to the Union that they would be working Saturday. Gette agreed that Respondent had not done so, and explained that Respondent had made an agreement that the crew would be off Thursday and Friday and work Saturday and Sunday. Doherty said, "it's illegal, you're violating the contract." Doherty then returned to the crew about 60 or 70 feet

[4] Gette owns one share of stock in Respondent.

[5] The collective-bargaining agreement contains a union-security provision. All of Respondent's employees had been in Respondent's employ in excess of the period set forth in the union-security clause.

[6] Apparently Hill also does work for Respondent which is not covered by the collective-bargaining agreement.

[7] All of the employees working on the roof at that time had been referred by the Union.

[8] Campbell testified that Doherty did not approach him.

away and had a conversation with them which Gette did not overhear.[9]

After about 5 minutes, according to Gette, Doherty approached him again and said the crew was working illegally in violation of the collective-bargaining agreement and they were leaving. Gette again said the agreement was that they would take Thursday and Friday off and work Saturday and Sunday. Doherty said the men are leaving and went over and spoke again to the employees. Doherty then returned and told Gette they were leaving; whereupon Gette said, "If you men are leaving, pick up your tools, change your clothes and go." According to him, he made this statement because no work was being performed and only after Doherty informed him that the employees were leaving. He specifically denies that he told employees to leave the job prior to Doherty's statement that the employees were leaving.

Gette also testified that Tacardon said he was not paying one more nickle's worth of fines, that Respondent was either union or nonunion and if it was nonunion, it would abide by the contract and he was leaving. By this time, Hill had come up on the roof. Doherty asked if Hill was going to continue to work. Gette said that was between Doherty and Hill, that there was work to be done and, if Hill wanted to stay on the jobsite, it was fine with him. Doherty asked Hill if he wanted to stay. Hill said he was staying. Doherty said there would probably be repercussions later on down the road once this was settled with the other men because Hill was staying and taking their work. Then Doherty and the three employees left. However, according to Gette, before the employees left the job he asked Tacardon, "Are you really, truly going to leave me in this position?" Tacardon said they were union or nonunion and since they were union, he was going to abide by the contract, he was not going to pay a fine.

Hill testified that he went up on the roof about 20 to 25 minutes after Doherty did. When he arrived on the roof, Doherty was talking to the crew and Gette was off to one side. Hill could not hear the conversation between Doherty and the other employees. According to him, the conversation continued for another 15 or 20 minutes, then the other employees left. He also observed Doherty talking to Gette but the only thing that he distinctly overheard was Doherty saying they would get fined if they stayed and worked. He also heard some conversation between Gette and the other employees. He heard Gette tell the crew that it was up to them whether they stayed or went home, that if they were going to stay, then go to work; and if not, go. The other employees left. They said they had to leave because they were threatened with fines by the Union. At one point, Doherty asked Hill if he was going to stay or leave. Hill said he was going to stay. This was just before Doherty left. The other employees had already started leaving the roof. Doherty and the other employees left the roof at the same time.

Campbell testified that when Doherty came up on the roof he never approached Campbell nor did he call the employees together as a group. He also denies that the three employees left the roof at the same time. According to him, he left the roof first. He further testified that he does not recall Tacardon saying anything to the effect that he was not going to be fined another nickel by the Union nor does he recall Doherty telling Gette that the men were leaving. Tacardon also testified that Doherty did not tell the employees to leave the jobsite nor did he threaten to fine them if they stayed at the jobsite. Tacardon further testified that he does not recall Gette saying to him as he was leaving, "Are you really going to leave me like this?" According to him, he did ask Gette before he left if he could get the job sealed off.[10] Gette said yes, there would be no problem, to go ahead and leave. Doherty had already left. Joe Fogafa and Tacardon later asked Gette again if he could get the job sealed off. Again Gette replied, "There's no problem, I'm covering the roof."

Gette admits that the employees did not tell him they were leaving nor did he hear Doherty tell the employees to leave. Rather Doherty told Gette they were leaving. Gette also testified that Tacardon returned to the jobsite about 1:30 or 2 p.m. and reaffirmed his position that he was not going to pay any fines, that they had been threatened with fines and if they were caught back on that jobsite when Doherty returned, they would be fined. The General Counsel offered no rebuttal testimony and during the presentation of the General Counsel's case in chief, Tacardon did not testify as to any afternoon conversation with Gette.

Tacardon testified that he reported to work on the next regularly scheduled workday, Monday, August 2, at the S.Q.I. shop. Fogafa, Gette, and Kotson were there. According to Tacardon, Kotson said Respondent was no longer applying hot tar roofing, that the employees could go to the Union and get their checks and get paid from them from then on. He further said that they could return at 10 a.m. for their paychecks. Campbell testified that when he reported for work at the shop on the morning of August 2, Kotson, Gette, and Hill were there. According to Campbell, Kotson told him that he was sorry but he was no longer going to be a roof applicator or in the roofing business, that he was tired of being harassed by "the union commie son-of-a-bitch, Brian Doherty." Kotson said his trucks were all for sale or lease and that Campbell's paycheck would be ready around 10 a.m. that morning. Employee Philo Boyd, who had not worked on July 31 and, accordingly, had not left the job that Saturday, testified that when he reported to work on August 2, Kotson told him he was through, that the men had walked off the job Saturday, that they had made their choice, they had their choice between the Union or the Company and they chose the Union. Kotson also said that Boyd could pick up his checks down at the union hall from that time on. He further told Boyd to return at 10 a.m. for his paycheck. Gette was present during this conversation and so was Hill for a portion of the time.

[9] According to Gette, at one point, work completely stopped while the employees stood around listening or talking to Doherty.

[10] "Sealing off" refers to putting a base sheet down and glazing it, or putting a one-ply covering over it.

At 10 a.m., Boyd, Fogafa, Campbell, and Tacardon returned to the S.Q.I. office, as instructed, to get their paychecks. According to the four employees, Gette, as well as Kotson, was present. According to Tacardon, Kotson said he was tired of the Union pushing him around, being on him all the time, that he was no longer going to do hot tar roofing and he was going to go into some other business. Kotson further said that the employees had left Gette standing on the job by himself to finish up, that they had left the job wide open. Tacardon said that Gette was the one who told them to leave. Kotson said, "Well, Herb [Gette] done you guys a favor then by telling you." Gette said, "Yes, I done you guys a favor." Kotson said he would give Tacardon a recommendation to work some place else. Tacardon said he did not need one.

Campbell testified that Kotson gave them their checks and asked if they would like to discuss it. Tacardon said, "Well, I thought we pretty much discussed it this morning." Gette said they had left him there with his pants down. Campbell said, "Well, everything was pretty much up in the air. We didn't know which way to go. We could have stayed and gone against the Union bylaws and possibly faced a fine or left, which we did." Gette said, "Bill, what would the fine have been? $300 or something like that? Look how much you've lost in time and wages already." Tacardon said, "Well, you're the one who told us to leave anyway." Gette replied, "Well, I did that to make the decision easier for you."

Boyd testified that Kotson asked if anyone had anything to say or wanted to discuss anything. Tacardon said, there did not seem to be a whole lot to discuss. Kotson said S.Q.I. was no longer a roofing contractor, that his equipment was up for sale or lease, and he gestured towards the window where Boyd could see a man removing the S.Q.I. signs from the truck. Kotson said he could not put up with the constant harassment from the "communist son-of-a-bitches" in the Union. Tacardon said they were told to leave the job by Gette and not by Doherty. Gette said, "I made that decision for you, Clifford, so you wouldn't have to make that hard of a decision, you know." Boyd said it could have been handled a little differently. He told Gette that Gette should have gone along with whatever was said that day, finished the job, and then taken care of it later. Gette said he would not accept the responsibility with S.Q.I.'s money and promise to pay the crew double time. Boyd does not recall exactly what Fogafa said during the meeting.

Kotson testified that he first learned of the July 31 incident about 6:30 a.m. on Monday, August 2, when Gette came in and informed him of what had happened.[11] According to Kotson, Gette informed him that Doherty had shown up on the job, there was a very heated discussion between Doherty and Gette and a work stoppage and threats of fines for the crew if they remained on the job. The crew stopped working and just stood around discussing the situation and then they left. Gette reported that at the time the crew left, aproximately 35 squares had been torn off the roof and, in order to secure the roof, Gette and Hill had to apply a base sheet and a ply of felt set in hot asphalt to make it watertight. According to Kotson, he discussed this slightly with each of the employees as they reported to work on Monday morning. The employees were told that they were being discharged because they walked off the job. No one told him they had been sent home by Gette. He further testified that, with the exception of Boyd, he spoke to each employee before making the decision to terminate them. The decision had been made by the time Boyd arrived.

Kotson made no attempt to relate exactly what was said during his August 2 conversation with the discharged employees. According to him, basically the nature of the discussion was that he felt that the liability with which the employees had left Respondent was completely unacceptable and inexcusable.[12] Kotson further testified that during this discussion, Tacardon made the statement that he was not going to get fined again by the Union. At the time he made that statement, the basic discussion was as to what had happened Saturday and the threats of fines at that time. He is not sure whether Tacardon made this statement when he first walked in or whether it was in the 10 a.m. discussion.[13] When asked why Boyd was terminated, Kotson testified, "Well, basically there were no men left. You can't run a crew without foremen, so to speak."[14] Kotson further testified that Tacardon, Fogafa, and Campbell were terminated for leaving the job.[15] When asked why Hill was not discharged, Kotson testified, "Well, basically because he continued to work and was also not a member of [Local] 54 before the 30th or the 31st." On cross-examination, he testified that he decided to retain Hill because Respondent had some work that had to be finished of the type usually performed by Hill.

Gette testified that he explained to Kotson exactly what had happened, that Doherty had come on the jobsite, there was some discussion as to whether Respondent was working legally or illegally that weekend, and the employees left Hill and Gette with 35 squares of roof to be replaced. Gette further explained that Doherty had come on the job stating that the crew was working illegally and, if they remained on the jobsite, they would be fined and that he would return to ensure that they did not remain on the job. The employees chose to leave, changed their clothes, and left. He further testified:

> Q. When you say the men chose to leave, was it their decision or your decision?
>
> A. Well, there was nothing being done. The men were standing around. There was a lot of milling around going on. I told them that since they were leaving that they should change their clothes and

[11] Kotson was out of town during the weekend of July 31.

[12] By "liability," Kotson testified that had it rained and the roof had not been put back, the liability would have been $50,000 to $150,000 for damage to the interior of the building and furnishing.

[13] According to Kotson, Tacardon had been fined previously by the union during his employment with Respondent.

[14] The foremen at that time were Fogafa and Tacardon.

[15] Tacardon had worked for Respondent a little over 10 years; Fogafa, 7 to 8 years; and Campbell and Boyd for less than a year. Hill, the first employee on Respondent's payroll, had about 6 months more seniority than Tacardon.

leave, that we had to get busy and got the roof back on. This was after Doherty told me they were leaving. I told them since they were leaving to change their clothes, pick up their tools and leave.

Gette denies that he was present on Monday morning when Kotson spoke to the employees either initially or when they returned at 10 a.m. to get their paychecks.

B. *Conclusions*

1. Respondent's contention that certain allegations should be deferred to the grievance-arbitration procedure

The complaint alleges that Respondent has violated Section 8(a)(5) and (1) of the Act in that it refused to abide by the contractual provisions requiring that the union be notified with regard to the scheduling of work on Saturday and Sunday. The contract provides for a Monday through Friday workweek except where there is mutual agreement between the Employer and the Union, and further that the Employer notify the Union no later than 4 p.m. Friday of any work intended to be performed on Saturday or Sunday. It is undisputed that Respondent did not so notify the Union. I do not credit Kotson that this omission was inadvertent. Rather, I conclude that Respondent deliberately failed to notify the Union because of its intent not to comply with the Saturday and Sunday penalty pay provisions of the collective-bargaining agreement.

Respondent argues that in view of the Union's August 12 grievance protesting the failure to notify the Union, this allegation of the complaint should be deferred to the grievance-arbitration procedure established by the collective-bargaining agreement. The Board's policy is that deferral is appropriate only in those situations where the dispute is essentially between the contracting parties and there is no alleged interference with individual employee's basic rights under Section 7 of the Act. *General American Transportation Corp.*, 228 NLRB 808 (1977); *Roy Robinson Chevrolet*, 228 NLRB 828 (1977).

Here, the failure to notify the Union is inextricably interwoven with the allegations of direct dealings with employees and the refusal to pay the contractual wage rate, which allegations constitute an essential facet of the alleged unlawful motivation for the discharges herein. In such circumstances, I find it inappropriate to defer to the grievance-arbitration procedure the allegation relating to Respondent's failure to notify the Union of its intent to work weekends on the psychiatric clinic job. I further find that such failure was violative of Section 8(a)(5) and (1) of the Act.

2. Other refusal-to-bargain allegations

It is undisputed that Respondent solicited the agreement of its employees to work on the psychiatric clinic job on weekends and that implicit in the solicitation was an agreement to straight-time compensation for this weekend work. The contract specifically provides for a workday between 8 a.m. and 4:30 p.m., Monday through Friday, except where there is mutual agreement between the employer and the Union to work other hours and that weekend work be compensated for at the double-time rate of pay. Yet the Union was never notified of Respondent's plan to work on the weekend and was thus deprived of any opportunity to bargain with regard thereto as clearly contemplated by the collective-bargaining agreement. In these circumstances, I find that Respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(5) and (1) of the Act.[16] *Friederich Truck Service*, 259 NLRB 1294 (1982).

The complaint alleges that Respondent unlawfully refused to adhere to the contractual wage rates for weekend work. Respondent argues that this allegation is clearly without merit since the employees were in fact paid double time for the hours they worked on Saturday, July 31. I find this argument unconvincing. It is clear from the record that Respondent accepted the condition that work on the clinic be restricted to weekends only because it intended to pay employees at the straight-time rate of pay rather than the double-time rate of pay required by the collective-bargaining agreement and, as discussed above, that this intent was implicit in its solicitation of employees to work weekends. In this regard, I note that Gette admits that Doherty told him on July 31 that the employees were working for straight-time compensation in violation of the contract, an observation which Gette did not deny. Instead, Gette explained that Respondent had an agreement with the employees to switch off days. Furthermore, as discussed below, Gette told Doherty and the employees that Respondent would not pay overtime. It was only after the Union challenged Respondent's plans to compensate employees at the straight-time rate that Respondent in fact paid them at the double-time rate for the approximately 4 hours they worked on Saturday, July 31. In the circumstances, I find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to adhere to the contractual wage rate for weekend work.

3. The 8(a)(1) allegations

The complaint alleges that Respondent ordered its employees off the jobsite and subsequently terminated them in violation of Section 8(a)(3) and (1) of the Act. Respondent argues that this alleged conduct, in fact, never occurred. Specifically, Respondent contends that Gette never ordered the employees off the roof. In this regard, Gette testified that it was only after Doherty had already informed him the employees were leaving that he told the employees "if you men are leaving, pick up your tools, change your clothes and go."

It is undisputed that Tacardon, Campbell, and Fogafa did leave the job and Respondent admits that they were discharged therefor. However, Respondent contends that their leaving could not have been in protest of Respondent's alleged conduct of bypassing the Union and refusing to pay the contractually required double-time wage

[16] In reaching this decision, I have thoroughly considered, and reject, Respondent's argument that its conduct was not unlawful inasmuch as Respondent was not "bargaining" with the employees since "this subject had already been bargained about with the Union, [and] any bargaining obligation owed to the Union had already been discharged."

rate since the employees had agreed to work for the straight-time rate. I am unpersuaded by this argument. I credit Doherty, Tacardon, and Campbell that Doherty did not tell Gette the employees were leaving but that Gette told them to leave. Their testimony is mutually corroborative. Gette admitted on that following Monday that he had done so.[17]

Further, the record indicates, and Kotson admits, that Respondent had entered into a contract to perform this job based on paying straight-time wages. The collective-bargaining agreement is quite clear and unambiguous that employees are to be paid double time for weekend work and Gette must have realized, upon Doherty's discovery of the work in progress at the clinic, that Respondent would be required to pay double-time wages at a considerable financial loss to Respondent. The testimony of the General Counsel's witnesses as to Gette's insistence that Respondent was not going to pay double time and, in essence, that if they were insisting on double time they could leave, is more consistent with the economic realities confronting Gette that morning than is his and Hill's testimony that Gette indicated that he wanted them to remain.

The testimony as to the water damage liability that could have occurred in the event of rain does not change this conclusion. Obviously Gette thought there was a good chance it would not rain or he would not have commenced the work and Gette and Hill were in fact able to secure the roof. Further, I conclude that Gette realized that, if requested, the employees would have remained at work to secure the roof and/or to complete the job but that the Union would demand that they be paid in accordance with the wage provisions of the collective-bargaining agreement. In all of the circumstances, I find that the employees did not have the option of remaining on the job but rather they were ordered off the job by Gette because he did not want to risk that almost certain liability of double-time pay if they remained.[18] In these circumstances, and in view of the fact that Boyd was also discharged even though he did not work that Saturday and thus did not leave the job, and Kotson's admission that Hill was retained in part because he was not a member of the Union, I find that the employees were discharged because the Union insisted that Respondent adhere to the wage rates set forth in the contract. Accordingly, I find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for the purposes of collective bargaining:

> All journeymen roofers, apprentices, and pre-apprentices employed by Employer-members of the Association in the counties of Clallam, Jefferson, King, Kitsap, Mason and Snohomish, Washington, excluding office clerical employees, guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been, and is now, the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. It would not effectuate the purposes of the Act to defer to the grievance-arbitration provisions of the collective-bargaining agreement for resolution of any issue involved herein.

6. By bypassing the Union and dealing directly with its employees; by refusing to abide by the contractual provisions that the Union be notified with regard to the scheduling of work on Saturday and Sunday; and by refusing to adhere to the contractual wage rate for weekend work, Respondent has committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

7. By discharging employees Clifford Tacardon, William Campbell, Philo Boyd, and Joseph Fogafa because they protested Respondent's refusal to pay the weekend wage rates required by the collective-bargaining agreement and/or because they are members of the Union, Respondent has committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

8. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Clifford Tacardon, William Campbell, Philo Boyd, and Joseph Fogafa in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that to the extent it has not already done so, Respondent be ordered to offer each of them immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make each of them whole for any loss of earnings he may have

[17] I do not credit Gette's denial that he was present during the Monday conversations nor Kotson's denial that the employees did not tell him Gette had told them to leave. Tacardon, Campbell, and Boyd all testified that he was present and made certain statements and Kotson did not deny Gette's presence.

[18] In reaching this conclusion, I have fully considered, and reject, Respondent's argument that the employees walked off the job and that such conduct was not protected because of an implied no-strike provision based on the grievance-arbitration provision of the collective-bargaining agreement. *Teamsters Local 174 (Lucas Flour Co.)*, 369 U.S. 95 (1962); *Mastro Plastics Corp.*, 350 U.S. 270 (1956); *Arlan's Department Store*, 133 NLRB 802 (1961). However, even assuming arguendo that the employees walked of the job, it was in protest of Respondent's failure to pay the contractual wage rate and, therefore, was protected concerted activity under the Act. Further, assuming the existence of an implied no-strike provision, it is well established that, absent express statements to the contrary, a no-strike provision does not apply to unfair labor practice strikes. *Servair, Inc.*, 236 NLRB 1278 (1978).

suffered by reason of the discrimination against him, plus interest, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[19]

[Recommended Order omitted from publication.]

[19] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).